87-1628

In The Supreme Court of the United States
October Term, 1987

Jack Smith, Gilbert Smith, Arthur Smith,
Frances Smith,

Petitioners

v.

State of Michigan, Department of Treasury,
and Robert Bowman, State Treasurer

On Writ of Certiorari to the

Supreme Court of Michigan

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QUESTIONS PRESENTED

1. Whether Petitioners were deprived of due process of law when the State Court of Claims held that Petitioners claim for redemption of a state issued tax stock certificate was time barred and presented no genuine issue of material fact, after conducting an immediate trial to resolve disputed issues of fact, without first requiring defendants to file an answer or plead affirmative defenses, allowing relevant discovery or subsequently providing the petitioners the opportunity to amend their complaint?

2. Whether a state statute of limitations, as construed and applied barred petitioners claim for redemption of a state authorized and sold tax stock Certificate, which provided that the state would honor the certificate at a certain date, or anytime thereafter that the state may choose, deprived petitioners of the equal protection of the law?

LIST OF PARTIES

All of the parties in the Supreme Court of Michigan are listed in the caption.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No.

JACK SMITH, GILBERT SMITH, ARTHUR SMITH,
FRANCES SMITH,

Petitioners

v.

STATE OF MICHIGAN, DEPARTMENT OF TREASURY, AND
ROBERT A. BOWMAN, STATE TREASURER

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF MICHIGAN

Patrick D. Hanes, on behalf of Jack Smith, Gilbert Smith, Arthur Smith and Frances Smith, petitions for a writ of certiorari to review the judgment of the Court of Appeals of Michigan in this case.

OPINIONS BELOW

The order of the Supreme Court of Michigan (App. A) is not reported. The opinion of the Court of Appeals of Michigan (App. B) is reported at 163 Mich App 179; 414 NW2d 374 (1987). The order of the Court of Appeals of Michigan denying peremptory reversal (App. C) is not reported. The

order the Court of Claims of Michigan denying petitioners motion for reconsideration (App. D) is not reported. The judgment and opinion of the Court of Claims of Michigan (App. E) is not reported.

JURISDICTION

The order of the Supreme Court of Michigan denying petitioners' application for leave to appeal (App. A) was entered on December 30, 1987. The judgment of the Court of Appeals of Michigan (App. B) was entered on July 1, 1987. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall. .. deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Michigan Court Rule 2.116 (B) and (C) (7) provides in relevant part:

> A party may move for dismissal of a judgment on all or part of a claim...based on [t]he claim is barred because of...statute of limitations.

3. Michigan Court Rule 2.116 (B) and (C) (10) provides in relevant part:

> A party may move for dismissal of or judgment on all or part of a claim...based on...[t]here is no genuine issue as to any material fact....

4. Michigan Court Rule 2.116 (I) (3) provides:

> A court may, under proper circumstances, order immediate trial to resolve any disputed issue of fact, and judgment may be entered forthwith

> if the proofs show that a party is entitled to judgment on the facts as determined by the court. An immediate trial may be ordered if the grounds asserted are based on subrules (C) (1) through (C) (6), or if the motion is based on subrule (C) (7) and a jury trial as of right has not been demanded on or before the date set for hearing. If the motion is based on subrule (C) (7) and a jury trial has been demanded, the court may order immediate trial but must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury.

5. Michigan Court Rule 2.116 (I) (5) provides in relevant part:

> If the grounds [for summary disposition] are based on subrule [2.116] (C) ... (10), the court shall give the parties an opportunity to amend their pleadings ...unless the evidence then before the court shows that amendment would not be justified.

6. Michigan Revised Statutes 1838, part 3, title VI, Chapter 2, §7 (subsequently amended by Michigan Revised Statutes 1846, Chapter 140, §7 to provide a ten-year limitation period) provides in relevant part:

> All personal actions on any contract, not limited by any other law of this state, shall be brought within twenty years after the accruing of the cause of action.

STATEMENT

On August 17, 1984, the petitioners filed a Complaint against the defendants in the Court of Claims of Michigan to redeem a tax stock certificate executed by the defendant STATE OF MICHIGAN, on or about July 15, 1839. The certificate contains ambiguous language concerning the time for payment by the state (See App. B). The defendants filed motions for summary disposition based on a statute of limitations, and claiming no genuine issue of material fact existed.

Petitioners raised the question of a deprivation of due process of law both by brief and oral argument in conjunction with the summary disposition hearings.

While petitioners are aware that federal questions raised by brief may be deemed abandoned questions by the Court, petitioners urge this Court to recognize the unique nature of the proceedings in the Court of Claims, and the fact that briefs and motions ultimately disposed of the petitioners' claim.

Mr. James Bissell, initial counsel for petitioners filed a brief in opposition to defendants motion for summary disposition on the basis of no genuine issue of material fact, claiming:

> To date, Defendants have not filed an answer to the complaint and neither

Defendants nor Plaintiffs have commenced discovery.

Petitioner's brief dated February 25, 1985.

Mr. Kenneth DeBoer, subsequent counsel for petitioners also questioned the nature of the hearings at the outset of the evidentiary hearing held June 26, 1985:

Mr. DeBoer: As the Court is aware, I was just handed this hearing brief and certainly haven't had a chance to review it [referring to defendants hearing brief] and will have to review it as the hearing goes along, and I don't have a two-track mind. Perhaps we can take a few minutes and I can briefly scan through it.

The Court: I think we ought to proceed. You'll have recesses. It looks to me in part it's just a summary of evidence that's going to be presented, some of the legal issues that have already been known.

Mr. DeBoer: If that's what it is and it isn't anything else that hasn't already been presented in the pleadings, then I agree with the Court.

On July 1, 1985, at the final

session of the Court of Claims, Mr. DeBoer asserted:

> Mr. DeBoer: ...We are here very early on procedurally in this matter. Even though this is a Court of Claims case and no jury trial is available, this is a very preliminary stage, and when the Court is being asked to short-circuit a lawsuit and dismiss it before the responding party files an answer, before all of the other discovery activities take place, it seems to me in the nature of a directed verdict, taking it away from the finder of fact and taking it away from a full fact-finding hearing at which more evidence and testimony would be available; that is the standard to be employed by the Court.
>
> Court of Claims Transcript July 1, 1985, p. 9

The method and manner of raising the equal protection concern in the Court of Claims occurred through oral argument at the evidentiary hearing held July 1, 1985. Mr. DeBoer emphasized the necessity of the Court to deal directly with the language of the certificate. He noted that opposing counsel stressed the due date as a fixed date and thus had argued that the applicable statute of limitations had run. Mr. DeBoer stressed that the Court must acknowledge that the certificate could be paid at the fixed date

or at anytime thereafter the State may choose. He pointed to opposing counsel's acknowledgement that the State had had difficulty paying the series of certificates by the fixed date, even extending payment into the 1860's. (Court of Claims Transcript, July 1, 1985, pp. 19-21). Mr. DeBoer also emphasized the reality that the state itself maintained control of payment of the certificate, not the holder, and therefore the statute of limitations did not apply. (Court of Claims Transcript, July 1, 1985, pp. 22-23).

However, on July 17, 1985, the Court of Claims entered an order of summary disposition in favor of the defendants pursuant to MCR 2.116 (C) (7), on the basis of a statute of limitation, and MCR 2.116 (C) (10), finding that no genuine issue of material fact existed. This order was entered after the court held evidentiary hearings to resolve disputed issues of fact, pursuant to MCR 2.116 (I) (3). The defendants were never required to file an answer or plead affirmative defenses, nor was relevant discovery permitted prior to petitioners' claim being disposed of on the merits.

Petitioners' present counsel subsequently brought a Motion for Reconsideration/Judgment Notwithstanding the Verdict/New Trial and Relief from Judgment,

and Motion to Allow the Filing of Plaintiff's First Amended Complaint. The Court of Claims, without a hearing, denied the Motion for Reconsideration. However, it never ruled on the Motion to Amend. Petitioners then filed a Motion for Peremptory Reversal to allow the filing of the amended complaint, and the Court of Appeals denied the motion. A timely appeal to the Court of Appeals followed.

Petitioners brief on appeal asserted that the failure of the Court of Claims to allow the filing of an amended complaint, deprived petitioners of due process of law in that all legitimate claims against the defendants had not been presented to the Court. Petitioners relied on MCR 2.116 (I) (5) as the basis for its argument. In addition, petitioners brief emphasized the necessity of the Court to construe the words delineating time of payment as they were written, and in light of the fact that no evidence had been presented in the Court of Claims that the State had declared the certificate due. Finally, Petitioners appealed to the Court of Appeals to recognize thatgenuine issues of material fact had erroneously been decided by the Court of Claims.

The Court of Appeals held that Petitioners appeal could properly be disposed of on the statute of limitations

issue (See App. B). The Court reasoned that the Court of Claims was not clearly erroneous in construing the time for payment as within a reasonable time. Since the statute of limitations was construed to entirely dispose of petitioners claim, the Court of Appeals declined to review the Court of Claims' determination that no genuine issue of material fact existed. The Court of Appeals also determined that leave to amend the complaint was properly denied since petitioners had not explained how an amended complaint would avoid the statute of limitations bar.

Petitioners presented the same concerns to the Supreme Court of Michigan (Petitioner's Brief, dated July 22, 1987) as was raised to the Court of Appeals, and also asserted that the Court of Appeals decision was clearly erroneous as it conflicted with Michigan case law. Petitioners application for leave to appeal also reiterated the issue of the applicability of the statute of limitations to a State created and controlled certificate. However, the Supreme Court of Michigan denied petitioners' application for leave to appeal.

REASONS FOR GRANTING THE WRIT

1. Due process of law under the Fourteenth Amendment provides the protection that no

state shall deprive a person of property without certain procedural and substantive safeguards.

Petitioners possess an identifiable property interest in the State issued and controlled tax stock certificate.

Due process is a flexible concept whose essence is the right to be heard at a meaningful time and in meaningful manner. **Logan** v **Zimmerman Bush Co.**, **455 US 422 (1982)**; **Dohany** v **Rogers**, **281 US 362 (1930)**. The right to be heard at a meaningful time and manner necessarily includes the right to notice reasonably calculated, under all circumstances, to afford interested parties an opportunity to present their objections. **Mullane** v **Central Hanover Bank & Trust Co.**, **339 US 306 (1950)**. Though **Mullane** dealt with the requisites for proper form and type of service of process, its principles extend to the nature and form of notice of an adverse party's defenses which ultimately summarily dispose of a complaint. It has been held that the denial of a right conduct discovery results in a denial of procedural due process. **Hahn** v **County Assessor for Bernalillo Count**, **88 NM 492; 542 P2d 1182 (1975) cert denied, 89 NM 5; 546 P2d 70 (1975).**

Moreover, under the Federal Rules of Civil Procedure, a court may enter judgment for the appropriate party based on

a contention that the cause of action is barred by a statute of limitation, if there is no substantial issue of fact involved. **Downey** v **Palmer**, **114 F2d 116 (1940)**; **Hubbard** v **Baltimore & Ohio RR Co.**, **249 F2d 885 (1957)**. Likewise, in Michigan, **Whitmore** v **Fabi**, **155 Mich App 333; 399 NW2d 520 (1986)**. However, the question of the governing date of accrual of a cause of action for statute of limitations purposes is a question of fact. **Tumey** v **City of Detriot**, **316 Mich 400; 25 NW2d 571 (1947)**; **Mowry** v **Saunders**, **33 RI 45; 80 A 421 (1911)**.

Michigan Court Rule 2.116 (I) (3) provides that an immediate trial may be ordered by the court to resolve any disputed issues of facts upon a motion for summary disposition. Petitioners' claim for redemption of certificate number 84 was ordered to such an "immediate trial" in the form of evidentiary hearings. These hearings were held to resolve disputed issues of fact prior to requiring the defendants to file an answer or plead affirmative defenses, and discovery of relevant facts had not yet commenced. In essence, petitioners were forced to a resolution of facts prior to all facts in issue even being defined by the defendants' pleadings.

Furthermore, on the basis of extensive briefs and arguments of fact

allowed to presented by defendants on the very days of the evidentiary hearings, petitioners' claim was summarily dismissed on the merits. The summary dismissal combined with the subsequent denials of an opportunity for rehearing and filing of an amended complaint, operated to deprive petitioners of their property without due process of law.

2. Generally, noncompliance with a state statute of limitations is a sufficient, independent state ground which bars further review by this Court. **Rogers** v **Jones**, **214 US 196 (1909)**. However, the validity of a state statute under the equal protection clause depends upon whether an otherwise neutral statute has been applied in a discriminatory manner. **Concordia Fire Insurance Co.** v **Illinois**, **292 US 535 (1934)**. To establish arbitrary and capricious administration of a law in violation of constitutional principals, an element of intentional or purposeful discrimination designed to favor one over another must be proven. **Washington** v **Davis**, **426 US 229 (1976)**.

The issue in this case surrounds the construction and application of a 20 year statute of limitations to bar petitioners' claim for redemption of a certificate issued by the State, which allowed payment out of tax revenues, at

anytime after a fixed date that the State may choose. Case law has addressed the applicability of statutes of limitations to public securities and obligations.

Where an order is payable out of a certain fund, the statute does not begin to run, nor can the statute be plead until the fund has been provided. Forbes v Board of Commissioners, 23 Colo 344; 47 P 388 (1896). Hubbell v South Hutchinson, 64 Kan 645; 68 P 52 (1902); J.H. Tillman Company v Seaside, 145 Or 239; 25 P2d 917 (1933). Other courts have held that the statutes of limitation do not begin to run even when a fund exists, until a formal call for presentment has come to the attention of the holder. Osage Farmers National Bank v Van Hook, 66 ND 196; 263 NW 162 (1935); Bale v Floyd, 199 Wash 503; 91 P2d 1025 (1939). Still other courts have held that where an instrument fixes a maturity date, or a due date is implied, the statute runs from such dates. Little v Emmett Irrigation District, 45 Idaho 485; 263 P 40 (1928); Coler v Sterling, 15 SD 415; 89 NW 1022 (1902).

Moreover, courts have held that when the maker of a note reserves the time for payment "when convenient", or "when able," such promises are conditional, and proof of the maker's ability to pay is an essential element of the claimants ' case. American University v Todd, 39 Del 449; 1

A2d 595 (1938). Other courts have held such promises to imply payment within a reasonable time. Smithers v Junker, 41 F 101 (1889); Black v Bachelder, 120 Mass 171 (1876). Still others have even held that such promises are unenforceable by the holder. Carlson v Johnson, 275 Mich 35; 265 NW 517 (1936); Nelson v Von Bonnhorst, 29 Pa 352.

However, none of the aforementioned cases deal with the precise language of certificate number 84, nor with an evaluation as to whether a statute of limitations as construed and applied to this type of state obligation complies with equal protection of the laws. Petitioners recognize that tax stock certificate holders are not a suspect group for which a strict scrutiny of judicial review will apply. Nevertheless, petitioners question whether the statute of limitation, as construed and applied to a state implemented and controlled certificate carries even a rational basis. For the State was authorized to sell a series of certificates to raise desperately needed funds, allowed to issue those certificates reserving a choice of time for payment, and remains today in a position to choose the time for payment.

Petitioners respectfully request that this petition be granted.

Dated:

BOS AND HANES, P.C
Attorney for Petitioners

By: _____
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smith.brf

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 30th day of December, in the year of our Lord one thousand nine hundred and eighty-seven.

Present the Honorable
DOROTHY COMSTOCK RILEY
Chief Justice
CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH
PATRICIA J. BOYLE,
DENNIS W. ARCHER,
ROBERT P. GRIFFIN,
Associate Justices

81328

JACK SMITH, GIBERT SMITH, ARTHUR SMITH, and FRANCES SMITH,

Plaintiff-Appellants,

v

SC: 81328
CoA: 87923
LC: 84-9498

STATE OF MICHIGAN, DEPARTMENT OF TREASURY, and STATE TREASURER,

Defendants-Appellees.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are

not persuaded that the questions presented should be reviewed by this Court.

1222

STATE OF MICHIGAN--ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, that is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 30th day of December in the year of our Lord one thousand nine hundred and eighty-seven.

_____,Clerk.
Jacqueline B. MacKinnon
Deputy

STATE OF MICHIGAN

COURT OF APPEALS

JACK SMITH, GILBERT SMITH, ARTHUR SMITH and FRANCES SMITH,

Plaintiffs-Appellants,

No. 87923

v

STATE OF MICHIGAN, DEPARTMENT OF TREASURY, and ROBERT A. BOWMAN, STATE TREASURER,

Defendants-Appellees.

BEFORE: D.E. Holbrook, Jr., P.J., and M.H. Wahls and G.W. Crockett, III [1], JJ.

PER CURIAM

Plaintiffs appeal by right the order of summary disposition entered in favor of defendants pursuant to MCR 2.116 (C) (7), on the basis of the statute of limitation, and MCR 2.116 (C) (10), on the

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[1] Recorder's Court Judge sitting by assignment on the Court of Appeals.

basis that no genuine issue of material fact existed. We affirm.

This case involves the plaintiffs' action to collect payment on a certificate of indebtedness, No. 84, titled "Michigan Tax Stock" ("Certificate No. 84"), purportedly issued by the State of Michigan in 1839 in the face amount of $1,000, with interest of 7 percent per annum payable semi-annual upon presentment and delivery of coupons at the office of the Morris Canal and Banking Company in New York City. The principal sum was payable on July 15, 1842, "or at any time thereafter that the State may choose". The amount in controversy is the $1,000 principal sum, plus claimed accrued interest, compounded semi-annually, allegedly exceeding $20 million.

Plaintiffs' complaint alleged that as owners of Certificate No. 84, plaintiffs tendered the certificate to defendants for payment by means of a demand letter dated June 29, 1984, and that the defendants

failed to make payment. The complaint alleged that only one interest payment had been made and, upon information and belief, that payment occurred on or about January 15, 1841.

Defendants filed a motion for accelerated judgment under then applicable GCR 1963, 116 (1) (2) and (5), asserting, inter alia, the statute of limitations as barring plaintiffs' suit. Affidavits and documentary evidence were filed in support of the motion. Subsequently, an evidentiary hearing, as ordered by the court of claims, was held on June 26, 1985. On July 17, 1985, the court of claims entered an order of summary disposition in favor of defendant pursuant to MCR 2.116 (C) (7) and (10).

On August 6, 1985, plaintiffs filed a motion for reconsideration, judgment notwithstanding the verdict, new trial, and relief from the judgment. The motion was denied on September 17, 1985.

Also on August 6, 1985, plaintiffs moved to amend their complaint. In the proposed amended complaint, plaintiffs sought (1) declaratory judgment that Certificate No. 84 was valid and enforceable; (2) a judgment against defendants for unpaid interest; (3) breach of contract damages exceeding $21 million; and (4) a claim to collect on a negotiable instrument. The proposed amended complaint alleged that plaintiffs, in addition to being the "owner" of Certificate No. 84, were the successors to the bona fide purchaser of the certificate and/or holders in due course. The court of claims never ruled on the motion to amend.

Plaintiffs' entire complaint may be disposed of on the basis that it is time barred. We first note that the trial judge, in deciding whether to grant defendant's motion for summary disposition, properly applied the Michigan Court Rules which took effect on March 1, 1985. See MCR 1.102;

Davis v **O'Brien**, 152 Mich App 495, 500; 393 NW2d 914 (1986), lv den 426 Mich 869 (1986). MCR 2.116 (G) (5), provides that in deciding a motion based on MCR 2.116 (C) (7) a trial judge must consider the affidavits, pleadings, depositions, admissions and documentary evidence filed at the time the motion is considered. In addition, an evidentiary hearing was ordered to resolve factual issues raised by defendant's motion. MCR 2.116 (I) (3).

Plaintiffs contend that their claims first accrued on July 15, 1984, when Certificate No. 84 was tendered for payment to the State and rejected. Defendants contend that plaintiffs; claim for the principal sum, if any, accrued by July 15, 1842, the date Certificate No. 84 matured and became redeemable, and that plaintiffs' claim in respect to the interest coupons accrued between 1839 and 1842 as interest accrued.

Three statutes of limitation, each commencing the running of the limitation period when the claim first accrues, were considered by the court of claims: (1) RS 1838, part 3, title VI, chapter 2, §1, which established a six-year limitation period for actions of debt, founded upon any contract or liability not under seal; (2) RS 1838, part 3, title VI, chapter 2, §7, which established a general 20-year limitation period for personal actions on contracts not otherwise limited [2]; and (3) §5807 (7) of the Revised Judicature Act of 1961 ("RJA"), MCL 600.101 et seq.; MSA 27A.101 et seq., which establishes a ten-year limitation period for actions on state obligations. Plaintiffs contend that the appropriate statute of limitation is contained in the RJA Court of Claims Act, MCL 600.6452(1); MSA 27A.6452(1), which establishes a three-

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[2] RS 1838, part 3, title VI, chapter 2, §7, was amended by RS 1846, chapter 140, §7, to provide a ten-year limitation period.

year limitation period for claims against the state, commencing when the claim first accrues. In deciding the motion, the court of claims applied the 20-year limitation period and found that the period had expired, at the latest, in the latter part of the 19th century.

A claim accrues only when suit may be maintained thereon. The Cooke Contracting Co v Dep't of State Highways #1 (On Reh), 55 Mich App 336, 338; 222 NW2d 231 (1974). The purpose of statutes of limitation is to deny a remedy to a party who has been unreasonably negligent in asserting his rights. The statutes are founded on the presumption or probability that a claim has been satisfied, and also on the inexpediency of permitting a stale claim to be prosecuted after a long acquiescence. Buzzn v Muncey Cartage Co, 248 Mich 64, 67; 226 NW 836 (1929); Lothian v City of Detroit, 414 Mich 160, 166; 324 NW2d 9 (1982).

As a general rule, promissory notes payable at a fixed time may be sued on only after the maturity date as thus fixed. Jacque v McRae, 142 Mich 370, 371; 105 NW 874 (1905). See also Steep v Harpham, 241 Mich 652, 655; 217 NW 787 (1928).

Essentially, plaintiffs contend that an "ad infinitum" construction must be given to the State's ability to extend the due date of Certificate No. 84 to a time of its choosing, at least until the State actually declares that the certificates are due. This is based on the wording of the following clause in the certificate:

> "Know all men by these Presents, That the State of Michigan acknowledges to owe HENRY HOWARD, Auditor General, the sum of One Thousand Dollars, lawful money of the United States of America, which sum of money the said State promises to pay to the said HENRY HOWARD, or to his assigns, at the Office of the Morris Canal and Banking Company, in the city of New York, on the fifteenth day of July, in the year of our Lord one thousand eight hundred and forty-two, or at any time thereafter that the State may choose, with interest thereon at the rate of

> seven percent. per annum, payable half yearly at the said Office of the Morris Canal and Banking Company, in the city of New York, upon presentation and delivery of the Coupons severally hereunto annexed, to wit. on the fifteenth day of January and the fifteenth day of July in each and every year, until the payment of the said principal sum of One Thousand Dollars.
>
> "The faith of the State is hereby solemnly pledged to secure the regular and punctual payment of the interest semi-annually, and the ultimate redemption of the said Stock." (Emphasis supplied.)

However, this claim is inconsistent with plaintiffs' contention that Certificate No. 84 was negotiable. An uncertain due date destroys negotiability of instruments, although the contract remains valid. Smith v VanBlarcom, 45 Mich 371; 8 NW 90 (1881). Further, our Supreme Court has been unwilling to construe instruments as providing for an "ad infinitum" time for performance. When no time for payment is specified, the law will presume a reasonable time. Siegel v Sharrard, 276 Mich 668, 672; 268 NW 775 (1936). Cf. St. James v Erskine,

155 Mich 606; 119 NW 897 (1909). See also Gross v VonDolcke, 313 Mich 132, 134-135; 28 NW2d 838 (1945). In Palmer v Palmer, 36 Mich 487 (1877), the Court held that a payee may not postpone enforcement of his claim indefinitely when a language of a note contemplates that a demand be made. The accrual, for purposes of the statute of limitation, commences to run when the payee, by his own act, and in spite of the debtor can make the demand payable.

Applying these principals to Certificate No. 84, it seems clear that the language "or any time thereafter that the State may choose" should be construed as contemplating an extension of the redemption date of July 15, 1842, to a reasonable time thereafter. The court of claims' determination that a reasonable time in this case would be until 1845, or the year when the State had the funds available to redeem the series of certificates containing

Certificate No. 84, was not clearly erroneous. [3]

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[3] The bond series containing Certificate No. 84 was authorized by RS 1838, part I, title V, chapter 5, §24, which, according to the certificate, stated the following:

> "The Auditor General shall, on or before the first day of May, next after receiving the returns of unpaid taxes from the County Treasurers, furnish the State Treasurer with an account of all unpaid taxes returned to his office by the several County Treasurers, and the amount due to each of the counties respectively, and the State Treasurer shall, upon the receipt of said account, issue Certificates of State Stock, of convenient amounts, and for an amount equal to the whole amount of said unpaid taxes, which stocks shall be redeemable three years and six months from the January next before their issue, to bear an interest of seven percent, payable semiannually, and shall be signed by the State Treasurer, and countersigned by the Auditor General."

The purpose of the bond issue was to obviate the state's need for funds to meet expenses, which had been impaired by delays in

collecting property tax revenues. Initially, the State intended to sell bonds totaling about $100,000 to provide for the total amount of delinquent taxes returned by the several counties to the Auditor General's office. However, due to the depressed state of the money market and the depressed value of stocks generally, sales could only be effected in the amount of $31,000. The bonds, totaling approximately $100,000, were auctioned for sale in the City of Detroit on July 15, 1839. Twenty thousand dollars in bonds were sold at the time to the Bank of Michigan. A second auction was scheduled for August 26, 1839. Eleven thousand dollars in bonds were sold that day to the Bank of St. Clair. According to the bond registers only bonds numbered 1 through 31, inclusively, were sold. The $31,000 "amount of issue" was included in the "statement of bonds issued by the State of Michigan, and the yearly amount of interest payable on the same" report prepared by the Auditor General and dated December 14, 1839. Interest of $1,085, or $35 per certificate, was paid semiannually through July 15, 1842, the date on which the certificates became redeemable. The State, however, did not redeem these certificates on July 15, 1842, apparently,due to a lack of funds. Certificates Nos. 28-31 were redeemed, using the proceeds from tax sales in October, 1843.

Contrary to plaintiffs' contention, the statute of limitations contained in the RJA has no application to their claim. By operating of the savings clause, MCL 600.9905 (1); MSA 27A.9905 (1), and MCL 600.5869; MSA 27A.5869, MCL 600.6452 (2); MSA 27A.6452 (2), the statute of limitation which governs is that under which

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In his December 2, 1844 annual report, the State Treasurer requested that "authority should be given to allow interest for such time after the last half years' interest fell due, as might intervene up to the time of redeeming the principal, or giving notice that funds were on hand for their redemption." The remaining certificates, Nos. 1-27, were redeemed by November 14, 1845. The bond registers have no entries showing a payment of interest subsequent to the July 15, 1842, redemption date. Interest, however, continued to be paid using a system other than the coupon system originally provided for with the certificates. In his December 1, 1845 annual report, the Auditor General specified that the proceeds of the previous year's state taxes were sufficient to pay off the $31,000 state tax stock.

their rights accrued. See also **Head** v **Children's Hospital of Michigan**, **407 Mich 388, 391; 285 NW2d 203 (1979).**

We find no error of law in the court of claims' determination to apply the 20-year limitation period contained in RS 1838, part 3, title VI, chapter 2, §7. Since this limitation period expired at least 100 years prior to plaintiffs' demand for payment on Certificate No. 84 and their subsequent filing of the complaint, the trial court did not err in granting defendant's motion for summary disposition.

In view of our disposition of this issue we decline to review plaintiffs' contention that summary disposition under MCR 2.116 (C) (10) was erroneous since Certificate No. 84 represents a valid obligation of the State.

Finally, plaintiffs' contention that they should be allowed to amend their complaint is without merit. Leave to amend a complaint is properly denied where the

amendment would be futile. Meyer v Hubbell, 117 Mich App 699; 324 NW2d 139 (1982), lv den 417 Mich 993 (1983). Since plaintiffs have made no effort to explain how their second amended complaint avoids the statute of limitation problems encountered by their first complaint, it is clear that the amendment would be futile and was properly disallowed.

Affirmed.

/s/ D.E. Holbrook, Jr.
/s/ M.H. Wahls
/s/ G.W. Crockett, III

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the 27th day of May in the year of our Lord one thousand nine hundred eighty-six.

Present the Honorable
Glenn S. Allen, Jr.
Presiding Judge
Robert B. Burns
Daniel F. Walsh

JACK SMITH, GIBERT SMITH, ARTHUR SMITH, and FRANCES SMITH,

Plaintiffs-Appellants,

v

STATE OF MICHIGAN, DEPARTMENT OF TREASURY, and STATE TREASURER,

No. 87923
L.C. No. 84 9498

Defendants-Appellees.

In this cause a motion for peremptory reversal is filed by plaintiffs-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for peremptory reversal be, and the same is hereby DENIED for failure to persuade the

Court of the existence of manifestly reversible error warranting peremptory relief. **Meyer** v **Hubbell**, 117 Mich App 699 (1982), Iv den, 417 Mich 993 (1983); MCR 2.119 (E) (3).

STATE OF MICHIGAN--ss.

I, RONALD L. DZIERBICKI, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 3rd day of June in the year of our Lord one thousand nine hundred and eighty-six.

_____

Chief Clerk

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

JACK SMITH, GILBERT SMITH,
ARTHUR SMITH & FRANCES SMITH,

Plaintiffs,

ORDER

v

File No.
84-9498-C

STATE OF MICHIGAN, DEPARTMENT
OF TREASURY & ROBERT A. BOWMAN,
STATE TREASURER,

Defendants.

At a session of said Court held in the City of Lansing, Ingham County, Michigan, on the 17th day of September, 1985, the Hon. Michael G. Harrison presiding.

A "Motion for Reconsideration/Judgment Notwithstanding the Verdict/New Trial and also Relief from Judgment" having been filed by the Plaintiffs in the above-entitled matter, and the Court being fully advised in the premises,

IT IS ORDERED that said motion is

hereby DENIED.

Michael G. Harrison
Circuit Judge

PROOF OF SERVICE

I do hereby certify and return that I served a copy of the above order upon each attorney of record by placing said order in a sealed envelope addressed to each with full postage prepaid thereon and placing said envelope in the United States Mail at Lansing, Michigan, on September 17, 1985 .

Dated: September 17, 1985

Secretary Virginia Hulbert

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

JACK SMITH, GILBERT SMITH, ARTHUR SMITH and FRANCES SMITH,

Plaintiffs,

v

File No. 84-9498

STATE OF MICHIGAN, DEPARTMENT OF TREASURY and ROBERT A. BOWMAN, STATE TREASURER,

Defendants.

Kenneth G. DeBoer (P12597)
Charles A. Palmer (P18602)
Attorney for Plaintiffs

George M. Elworth (P23979)
Attorney for Defendants

JUDGMENT

At a session of said Court held in the Town Center Building, City of Lansing, County of Ingham, Michigan, on the 17th day of July, 1985.

PRESENT: HONORABLE MICHAEL G. HARRISON
Circuit Judge

Defendants having moved for summary disposition of Plaintiffs'

complaint, both by way of accelerated judgment and summary judgment (summary disposition), both parties having filed briefs and evidence in the matter, an evidentiary hearing having been held on June 26, 1985, the court having heard argument thereafter, and the court being fully advised in the premises,

NOW THEREFORE, IT IS HEREBY ORDERED that Defendants' motion for summary disposition based on MCR 2.116 (C) (7) and (10) is hereby granted for the reasons set forth in the court's opinion delivered from the bench on July 1, 1985, and Plaintiffs' complaint herein is dismissed, no costs, a public question being involved.

_____

Michael G. Harrison
Circuit Judge

OPINION OF THE COURT OF CLAIMS

July 1, 1985

THE COURT: All right. This matter has been before the Court on several prior occasions. The Court had done some substantial initial research on the question of accelerated judgment, and I'm going to use the term because I think it's easier right now to use "accelerated summary judgment, and I'm going to use that term because I think it's easier right now to use "accelerated summary judgment" rather than "summary disposition," just for purposes of this hearing.

The original motion for accelerated judgment was filed under the old court rule so I'll keep that distinction for purposes of this opinion. The Court, in further reviewing this matter, thought that probably, although it felt that there were some areas that needed further development, it would be as expeditious and probably

beneficial in the long run for the parties and counsel involved to go a little bit further and deal with the issue for summary judgment as well, and therefore, requested the additional proceedings.

I would commend both counsel for the manner in which they have handled this matter. It's been beneficial to the Court and certainly a major issue for both parties.

Now, this matter is first before the Court on a motion for accelerated judgment filed by the State of Michigan, Department of Treasury and Robert A. Bowman, Defendants, pursuant to the former GCR 1963, 116.1 (1), (2) and (5). The Defendants assert the Court lacks jurisdiction over them and the subject matter and that the applicable statute of limitations has expired.

The facts are as follows: On June 29th, 1984, Jack, Gilbert, Arthur and Frances Smith, the Plaintiffs, presented a

Michigan Tax Stock Certificate issued on July 15th, 1839, to the Defendants for payment.

The obligating language of the certificate will not be recited in full but incorporated in the opinion of this Court at this juncture.

Attached to the certificate are five interest coupons which provide that thirty-five dollars would be paid on presentation at the Morris Canal and Banking Company on the 15th day of July, 1840, and of January and July of 1841 and 1842.

The statute under which the certificate was issued as appears on the face of the instrument is RS 1838, Part I, Title V, C 5, Section 4, provides:

> "The auditor general shall, on or before the first day of May next after receiving the returns of unpaid taxes from the country treasurers, furnish the state treasurer with an account of all

> unpaid taxes returned to his office by the several county treasurers, and the amount due to each of the counties respectively; and the state treasurer shall, upon receipt of said account, issue certificates of state stocks of convenient amounts, and for an amount equal to the whole amount of said unpaid taxes, which stocks shall be redeemable three years and six months from the January next before their issue, bear an interest of seven percent, payable semi-annually, and shall be signed by the state treasurer, and countersigned by the auditor general.

Defendants argue Plaintiffs' claim is barred by the Court of Claims Act, MCL 600.6452 (1); MSA 27A.6452(1), which provides:

> "Every claim against the State, cognizable by the Court of Claims, shall be forever barred unless the claim is filed with the clerk of the court or suit instituted thereon in federal court as authorized in Section 5440, within three years after the claim first accrues. "

Defendants also maintain the claim is barred by the various statutes of limitations in effect since issuance of the certificate; specifically, RS 1838, Part 3, Title VI, C 2, Section 1, which is the six-year limitation on actions founded on contract or liability not under seal, and Section 7, which is a 20-year limitation on personal actions on contract, RS 1846, C 140, Section 7, which is the shortened statute of limitations, that being 10 years, and RJA 5807(7), the 10-year limitation on state obligations. Defendants contend that

whatever limitation period is used will not cover the 142-year span which is involved in this matter. Defendants' position is the claim, if any, accrued July 15th, 1842, when the certificate matured. Defendants point out that no provision in the certificate requires the State to make a call. Defendants maintain the language "or at any time thereafter that the State may choose..." gives the State a choice, not the Plaintiffs a choice. Defendants also argue it is not reasonable to hold a demand instrument for over a hundred years and, finally, that compounded interest was not contemplated in light of the coupons calling for payment twice yearly.

Plaintiffs argue the claim did not accrue until June 29th, 1984, when they were first aware their certificate would be dishonored. Plaintiffs claim the language of the certificate "... or at any time thereafter that the State may choose... " contemplates the certificate was meant to be

payable at any time and that interest would accumulate at seven percent until either payment of the principal on presentation by the holder or on a call by the State. Plaintiffs assert that any ambiguity in the document should be construed against the drafter. Plaintiffs maintain that Defendants are attempting to assert the equitable doctrine of laches, which is inapplicable to actions at law.

In reviewing a motion for accelerated judgment, the Court must accept all well-pled allegations and all reasonable conclusions therefrom as true, **Crowther v Ross Chemical and Manufacturing Company, 42 Mich App 426; 101 NW2d 577 (1972).**

The issue before the Court relative to accrual actions is perhaps best summarized in 51 Am Jur 2d, Limitation of Actions, Section 115 (1970) as follows:

> "Where the statute of limitations begins to run as soon as the right to make a demand arises, the

claimant's delay in presenting his claim or giving notice will obviously not affect the running of the statute, but if the statute is deemed to run from the date of presentation or notice and the law does not expressly prescribe any time limit therefor, the question arises whether the claimant may indefinitely postpone the operation of the statute by delaying his presentation or notice."

American Jurisprudence continues by providing the following answer:

"The view generally prevailing is that the claimant cannot postpone the operation of the statute of limitations indefinitely by delaying his presentation or notice of claim."

A more in-depth analysis is provided in Section 114 as follows:

> "Where a demand is necessary to start a limitation period running, a party is not permitted to postpone indefinitely or unreasonably, by failing to make demand, the time when the statute will begin to run, for by his laches he may be deemed to have perfected his right of action so as to start the running of the statute although he never actually made demand. Unless a delay in making a demand is expressly contemplated by the parties, the courts may presume from the lapse of an unreasonable time that a demand was made and refused. This is particularly so where the situation and the relation of the parties are such as to render it

improbable that the demand should be neglected. On the other hand, the rule will not be applied where it appears that the parties contemplated an indefinite delay in the making of the demand. Although the question is not settled by any precise rule and is dependent to some extent on circumstances, the reasonable time within which demand must be made is usually held to be the period of the statute of limitations for bringing the action."

The first critical inquiry is whether a demand was necessary in this situation. Michigan has followed the rule that when demand on an obligation is contemplated, it must be made within a reasonable time. In **Volli** v **Wirth**, **164 Mich 21; 129 NW 9 (1910)**, the plaintiff lent defendant the sums of $40, $12, $18 and $180

over a period of about three years ending in 1898, each time telling defendant he could have it to take care of for him and that he could use it without any statements concerning interest. In late 1905, plaintiff wanted to either get his money or secure the sum by a writing. Defendant told plaintiff's agent if he had another year he would pay the whole sum owing. Plaintiff left and a year later tried again, but was run off defendant's farm. At trial plaintiff's attorney produced the writing prepared to acknowledge the debt even though never signed by the defendant. The writing as translated from German provided:

> "I have of Mr. Frederick Volli a capital borrowed and indeed in sums: first, $40, then $12, $18. On the 26th of December, 1898, the sum of $180, then later $50 and then $25; now is the sum $325

today not yet paid with interest. Detroit, the 2 December 1905."

"The Michigan Supreme Court wrote: "It seems, then, that each transaction amounted to a lending of money, upon interest, payable within a reasonable time after demand."

The Court continued:
"And if it be assumed that an actual demand was contemplated by the parties and was necessary before an action to recover the money could be maintained, no demand was made until nearly seven years had expired after the last money was given to defendant."

Therefore, the Court held the lower court was not in error in determining

plaintiff could not recover. Even in the absence of a writing which evidences at least the intent of one party as in Volli, numerous authorities have held that not providing a time for payment of an obligation means a reasonable time is contemplated. Siegel v Sharrard, 276 Mich 668; 268 NW 775 (1936); McCune v Grimaldi Buick-Opel, 45 Mich App 472 ; 206 NW2d 742 (1973); Solomon v Western Hills Development Company, 88 Mich App 254; 276 NW2d 577 (1979); Bruno v Zwirkoski, 124 Mich App 664; 335 NW2d 120 (1983); Opdyke Investment Company v Norris Grain Company, 413 Mich 354; 320 NW2d 836 (1982).

In this matter, the Court notes the clear language on the face of the document with respect to demand. Both the original $1,000 obligation and the interest payments are due a specific person, Henry Howard or his assigns; at a specific place, the Morris Canal and Banking Company in New York; and at a specific time, July 15th,

1842. These specifics tend to indicate that an indefinite delay was not envisioned.

It is suggested to the Court that the words "or, at any time thereafter that the state may choose," serve to extend the obligation beyond July 15th, 1842. The Court has been presented evidence that 31 stock certificates were issued and have all been redeemed, and no evidence was presented that the State chose to extend the time beyond 1845, and this would take into consideration the fact that the records would indicate that there was a default in the prompt payment of the stock certificates and, additionally, it verifies the fact that the language was there in the event not that the holder would have the opportunity to extend but that in the event of unusual circumstances, such as obviously occurred, that the State would have that option.

The Court is of the opinion that "any time thereafter" does not mean on ad

infinitum at Plaintiff's whim. Construction of the words "any time thereafter" was addressed in **St. James v Erskine, 155 Mich 606; 119 NW 897 (1909).** At issue was language in a quit-claim deed given by plaintiff, the original owner of a tract of land, to defendant, holder of a tax title to the land, which gave defendant "all the timber of every nature and description now standing or fallen on the land..." and describing the land at that point, "... with the right to enter upon and cut and remove said timber at any time thereafter."

The court found that all the timber could have been removed within two years, and that defendant had been afforded a reasonable time to do so. The court relied on **Huron Land Company v Davidson, 131 Mich 86; 90 NW 1034 (1891),** where a reasonable time for timber was given in the fact of a deed silent on the time of removal, as authority to limit "at any time thereafter" to a reasonable time. The Court

Cannot ignore the period of time which has elapsed.

Now, this is not a situation where the statute of limitations was missed by a day, but rather in excess of 100 years. Appearing that the option to extend beyond 1842 the time for presentment has not been exercised, except to the extent that the Court has noted, the Court is of the opinion Plaintiffs or their predecessors were provided ample opportunity to make a demand and did not so exercise that option.

The Court will therefore -- and I 'm going to comment about some of the facts in a few minutes. The Court, therefore, is of the opinion that the motion for accelerated judgment should be granted.

Additionally, we have what is the equivalent of a motion for summary judgment on the equivalent of GCR 1963, 117.2(3) or the current MCR, under which this motion is designed to test whether there is factual support for a claim or defense. **Sullivan** v

Thomas Organization, 88 Mich App 77; 276 NW2d 552 (1979), Smith v Woronoff, 75 Mich App 24; 254 NW2d 637 (1977). The motion is in the nature of an inquiry in advance of trial for the limited purpose of examining whether there is a genuine issue as to any material fact. Edwards v Montrose, 18 Mich App 569; 171 NW2d 555 (1969). All pleadings, affidavits, depositions, and other documentary evidence must be considered when passing on such a motion. GCR 1963, 117.2 (3), Brooks v Reed, 93 Mich App 166; 286 NW2d 81 (1979).

Before judgment may be granted, the Court must be satisfied, first, that it is impossible for the claim or a defense to be supported at trial because of some deficiency which cannot be overcome, or, two, all facts essential to the rendition of judgment on the claim or defense are not disputed by the parties. Rizzo v Kretschmer, 389 Mich 363; 207 NW2d 316 (1973), Continental Casualty Company v Enco

Associates, Inc., 66 Mich App 46; 238 NW2d 198 (1975). However, the Court must avoid making findings of fact under the guise of determining that no issue of material fact exists, Partrich v Muscat, 84 Mich App 724 ; 270 NW2d 506 (1978), in order not to infringe on the right to a trial of disputed facts. Bob v Holmes, 78 Mich App 205; 259 NW2d 427 (1977).

Now, in his argument, Mr. DeBoer correctly addressed the question that this must be considered in the light most favorable to the non-moving party; and although there was mention that the documents in part were excerpted portions, the Court would be remiss that if it did not indicate that on the issue before the Court, that was the time to present any countervailing portions should there have been any relative to the issue before the Court on the motion. So the Court must assume that none having been present, none exist.

Now, the Court, for purposes of this motion, will apply the 20-year statute of limitations period and it does so because that would be the statute most beneficial to the Plaintiffs. There is probably good argument that other statutes could be applied under the circumstances, even as the result of amendments to the existing statute of limitations, but for purposes of this record the Court will consider the 20-year statute of limitations to be applicable.

Additionally, the Court is of the opinion that beyond any question, and this is in the opinion of the Court, most of these findings are not even by a preponderance of the evidence. They go well beyond preponderance of the evidence, almost to the criminal standard that we apply of beyond a reasonable doubt. And the Court would find that there is virtually no extension beyond 1845, even though there may be some argument that the obligations were not satisfied until the 1860's. And for

purposes of this motion again, just for the argument, the Court will consider the satisfaction as not having been made until the 1860's. Even under those circumstances, if one adds the 20-year statute of limitations period, we are talking a span of going back 100 years.

Now, the Court is of the decided opinion that the certificate in question here was never issued, and the Court does not deal with the motives or integrity of anybody. I want to make that very clear. That's not the purpose of the Court making this ruling, nor has any evidence of any nature been presented to the Court on that issue. And so I want to lay to rest at this point that that issue has been addressed by the Court because it is not and the Court does not impute any bad faith to anyone or any question of anybody's integrity as it relates to this question. But I think if one reviews carefully the documentary evidence which has been

presented to the Court on the question of summary judgment, first, we have other known certificates which have been presented to the Court and these vary from 32 on up in different staggered fashions.

Now, the Court is of the opinion, number one, that under no circumstances would these have been issued out of sequence. It does not make any sense that they would be issued out of sequence. Numbers 1 through 31 are accounted for and there is no question by any of the documentation which has been submitted to the Court that those 31 were issued. But assuming that these other certificates represent certificates which were not issued, it would not make any sense that they were -- others outstanding were issued at random.

Secondly, and I think it's very persuasive to this Court in reviewing all of the documents submitted from the State Archivist and in particular the journals

which were kept from 1838 through 1845 or '44, if you look at those, the minutia of detail in those documents dealing with entries of $5, $4.09, $8.58, and even smaller amounts down to cents only without any dollars, it's very apparent to the Court that this was a very small state at that time and minute records were kept.

It's apparent that -- and as clear as a bell as far as this Court is concerned -- Certificates 1 through 31 were issued, cash was received for those and there were obligations recognized as far as the payment of interest for the 31 certificates. There is never a mention of any nature under any circumstances at any time which go beyond that, and it is beyond the point of even credibility of this Court to believe otherwise when one looks at the detail of the records kept by the State at that point in time.

Now, they even make it a point to discuss the fact that $4,000 was repaid at

one point, another $12,000 at another point, and that the balance remaining, and that is at page 270 of one of the House or Senate Journals which were kept.

Now, it's just not logical under any circumstances for this Court to accept or believe that all of the others were outstanding in addition. In other words, assuming we go past 84, there is virtually no mention, and again I would have to indicate that it just does not make sense that they were issued out of sequence, so we would have to account for all of the money going from 32 up through 84 even if we don't go beyond 84. There is no mention under any circumstances of that situation existing.

Now, the Court is of the opinion that, in looking through the documents, there were no other issuances made before the expiration date contained on the face of these documents, and this indicates to the Court several things. First, that is clear

as far as the State documents and records which were submitted establish; furthermore, even if one were to accept the fact that the State had contemplated an attempt to reissue the additional remaining certificates and had clipped out the one coupon, we are dealing then with a period of certificates, the coupons which would go only beyond a certain point, but there are virtually no records at all of the certificates which are here are identical in the fact that one coupon was clipped. But all the lower numbers would have to have been issued, in the opinion of the Court, as I've indicated and it's not logical to believe that these were all surrendered without anybody else having clipped one other coupon and presented it for payment.

Again, it just does not make logical sense that somebody purchased these certificates, never clipped the coupons, presented them all for full payment, coupons

and the certificate itself, without having done anything more.

Now, the Court further--and I'm only now getting to the testimony which was presented and I don't think the Court really has to deal to a great extent with the testimony. I think it's apparent from the records and through the affidavits issued by Mr. Lucas that receipts were only acknowledged for $31, 000, which is precisely in accord with all of the records which exist, and the fact that the certificates beyond that would not indicate, even as low as Number 44, anything bearing on an issuance. But it also appears to the Court reasonable to believe, and I do accept as within the purview of the expertise of Mr. Speckin the fact that the transfer of ink could only have appeared after a period of time and that he testified that it would be a substantial period of time before that transfer could take place. That further persuades the Court that the documents

remained together up until at least some point in time substantially later but beyond any date which would have been reasonable here for these to have been issued. In other words, the documents could not have been issued past the period for which the call existed. And the substantial period of time that would have taken for the ink offset to occur was a substantial period of time and would not have existed within a short period.

Now, I do not know and I don' t think I really have to address the question of whether the purpose of these lines was for purposes of cancellation or not. One could argue that his testimony in that regard was as speculative as Mr. Boldt's, but I find it was interesting and until I looked at the certificates, I accepted Mr. Boldt's testimony and I would say his theory was certainly logical and I would have given some credence to it and, I would state for the record, did not because Mr.

Boldt had no expertise whatsoever in older types of documents. And I don't think he's in a position to testify as to the purposes of what occurred back in the 1800's. Frankly, that is true with Mr. Leckey's testimony as well. I don't think any of us can sit here and say what is in the standard in the industry today could be applied to what occurred back in the middle 1800's without some expertise in having dealt with at some point in time.

But what I find is not the case, as I had assumed from the testimony, that there were three different colored inks used here, and that is clearly not the case. On the face of these documents, it's the same color ink which is used throughout.

Now, even if I were to accept the testimony that the wavy lines were for purposes of matching the stock, the interest coupons -- and that might make some sense because one could check to see whether the lines matched up above as the coupons came

in to know whether they were fraudulent. It does not explain the need for the wavy line through the entire certificate. There is nothing that could be matched to verify whether that line matched and that there was no way to match it to another document to say whether it matched at a certain point.

Furthermore, even if one were to put wavy lines through to authenticate, and I'm assuming if one has the ability to forge, they have the ability to draw a wavy line in some close proximity -- it does not make sense to the Court that with the wavy lines that one would put a line through a signature. So beyond that, I'm not going to comment in great part except I think that as one looks at the testimony, it's much more credible to believe that these were documents which were intentionally destroyed at some point in time.

The color of the signature of the ink of the Treasurer is different from the rest of the ink used, and I can't imagine

why anybody would line out the State Treasurer's signature with another ink, or Mr. Howard's signature for that matter, unless the purpose was to have some destructive value as to the documents.

Now, again, I don't impute the integrity of either of the brokers who were here because I just don't think they had expertise in ancient documents as to practices within the industry. Neither testified that they had studied or learned what practices were back at a day and age when we did a lot of things much differently than we do them today.

All right. I guess that covers my notes on the testimony and the issue of the summary judgment. Therefore, the Court finds that the document in question here, Number 84 was never issued by the State of Michigan, and the Court will therefore grant the Defendants ' motion for summary judgment in addition to the accelerated judgment

which I've already indicated. I will approve an order to that effect.

I had requested to look at the certificates. They were provided to me, and the record may reflect that they are being returned to Mr. Elworth at this time.

MR. ELWORTH : Thank you, your Honor.

THE COURT : Okay, thank you.

MR. DeBOER: Thank you, your Honor.

(At about 3:53 p.m., proceedings concluded.)